

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

FILED

SEP -5 2008

RICHARD W. WIEKING
CLERK U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
07-5124

Ivan Kilgore,

Petitioner,

v.

J. Walker, acting warden,

Respondent.

No. C 07-5

IMMEDIATE RELIEF REQUESTED

THE HONORABLE SUSAN ILLSTON

Application and request for
leave to conduct discovery;
and appointment of counsel
to facilitate said discovery.

NOTE TO THE COURT: All relev-
ant references are attached
hereto(transcripts, ect)

EXHIBITS (A)-(D)

Please take notice that petitioner, Ivan Kilgore, hereby
applies in pro se for leave of court to conduct discovery pursuant
to Rule 6(a) of the Federal Rules Governing Section 2254 cases, 28
U.S.C. foll. §2254. In addition, petitioner, pursuant to 18 U.S.C.
§3006A subsecetion 2(b), requests appointment of counsel to facil-
itate said discovery. Please take note of petitioner's indigent
status in filing the initial Writ of Habeas Corpus in forma paupe-
ris.

Petitioner's application for leave to conduct discovery seeks
to procure evidence that is not currently in the court record and
is necessary for the reviewing court to make a fair determination
of the merits of the grounds raised in the pending 28 U.S.C. 2254
(d) challenge to the State Court's ruling with regards to petition-
er's claim(s) of recieving IAC. The evidence sought seeks to estab-

lish the court's ruling was contrary to/unreasonable application of clearly established Federal Law as determined by the United States Supreme Court in Strickland v. Washington (1984) 446 U.S. 668, specifically the second prong of the case---ESTABLISHING PREJUDICE!

Among other related claims of IAC, petitioner has raised before this court the question of the contrary to/unreasonable application of Strickland v. Washington as applied by the State Court in denying his claim that trial counsel rendered IAC in failing to investigate, obtain and prepare[favorable] evidence to support petitioner's creditability stemming from a 1997 Oklahoma jury trial which resulted in a manslaughter conviction that is the equivalent under California's imperfect self-defense. (See initial filing, Writ of Habeas Corpus, claim 5[D])

During the trial in the present case, the prosecution sought to introduce evidence of petitioner's testimony stemming from the Oklahoma trial relevant to the prosecution's contentions as to the petitioner's ability to fabricate a defense of self-defense. (RT 609-612; CT 325) The trial court readily accepted the prosecution's contentions with regards to the relevance of the evidence in face of defense counsel failing to partake in the adversarial process.(RT 1073-1075) U.S. v. Cronin, 446 U.S. 648

The Court of Appeal affirmed on the theory that the trial court properly exercised its discretion in ruling that the Oklahoma prior was admissible to prove intent under Evid. Code §1101(b).to (slip op. pp 14-16) That conclusion misstated the record. The trial court never ruled that the prior was admissible under §1101 (b) to prove intent. Accordingly, the Court of Appeal's opinion

1 is defective, because it depends on a finding never made by the
2 trial court.

3 Despite the Court of Appeal's ruling, the grounds for the
4 trial court's ruling allowing the prosecution to cross-examine
5 on petitioner's Oklahoma testimony was, (a) because such testimony
6 was relevant to his credibility, and (b) because of the so-called
7 "doctrine of chances,"(RT 1073-1075)

8 Trial counsel at all points relevant to the admission of the
9 Oklahoma evidence abandoned her adversarial duties for when the
10 prosecution informed both the court and defense he sought to intro-
11 duce the isolated evidence---only the petitioner's testimony from
12 that case---which standing in its entirety was manipulated to con-
13 form with the prosecution's contentions of it being evidence of
14 petitioner's alleged deceit to fabricate a self-defense defense,
15 defense counsel just sat there like a knot on a log when her adver-
16 sarial obligations and common sense beckoned of her to investigate
17 the totality of the Oklahoma trial proceeding so as, in making
18 tactical decisions thereafter, she would be informed of the prevail-
19 ing evidence presented in the Oklahoma trial which refuted the
20 prosecutions allegations of a fabricated self-defense defense in
21 the Oklahoma trial; as it would refute the allegations of the pro-
22 secution in the present case. Counsel however did no such thing.
23 Surely, counsel had to ponder the weight of the totality of the
24 evidence presented at the Oklahoma trial and relize in light of the
25 petitioners prior conviction, and the fact that he informed her
26 among other related issues with regard to the Oklahoma case that
27 the conviction was the result of a hung jury[9 to 3 in his favor
28 to acquit in self-defense], that there was sufficient evidence sup-

1 porting petitioner's testimony from that case and his credibility.

2 Counsel's purported failures not only attributed to claim #5
3 (E)(F)(I) & (J) of petitioner's Writ of Habeas Corpus pending be-
4 fore this court which were the byproducts of an uninformed tactical
5 decision based on counsel's opinion, an opinion that had no premise
6 in absence of proper investigation, "he(petitioner) sounded like
7 a liar..." with regard to the content of petitioner's Oklahoma
8 trial testimony(See counsel's evidence hearing testimony at RT
9 1029-1030), they also infringed upon petitioner's constitutional
10 right to present before the trier of fact evidence of actual innoc-
11 ence with regard to the issue of "intent."

12 In connection to the available evidence counsel failed to
13 investigate and prepare to refute the prosecutions contentions that
14 the Okalhoma testimony of petitioner was evidence of his alleged
15 ploy,as argued by the Oklahoma prosecutor too, to deceive the
16 people with a fabricated defense of self-defense listed at pages
17 8-10 of the "Supplement" Memorandum and Points of Authorities filed
18 in petitioner's pending Writ of Habeas Corpus, petitioner brings
19 to the attention of the reviewing court the fact that in the prior
20 case multiple witness and the medical examiner testified that there
21 was only one shot fired and decedent was only hit once as a result
22 of the circumstances leading up to the shooting incident. Cirum-
23 stances, that the Oklahoma jury expressively found petitioner's
24 actions not in accordance to a malicious intent, rather one of
25 the "unnecessary" belief in the need to use self-defense. The
26 jury implicitly found, due to the one shot fired by petitioner,
27 his intent was to deter his assailant which opposed the retaliatory
28 contentions of the prosecution. This evidence, had counsel procured

1 it, was relevant to the present case for the evidence screams at
2 the trier of fact that petitioner's intent very well could have
3 been in sync with the need to defend himself in face of imminent
4 danger. The fact that in both cases petitioner only fired one shot,
5 as the Oklahoma jury implicitly found, reflected his intent to
6 deter his assailant, which in itself opposes the prosecutions
7 retaliatory contentions, especially in the present case where there
8 was two objects of retaliation. Both the decedent and Terry Dandy
9 AKA "T" were reported as having assaulted and robbed petitioner on
10 multiple occasions. Moreover, the physical evidence in the present
11 case does not support retaliation for acts motivated on such prem-
12 ise, the courts have witnessed, are over-kills---multiple injuries
13 or gun shots are inflicted on "all" persons of retaliatory con-
14 viction. Without question this evidence would have assisted the
15 trier of the fact to determine innocence.

16 For reasons cited herein this motion and in connection to
17 petitioner's Writ of Habeas Corpus claims of IAC, it is imperative
18 to prevail on these claims that petitioner set before the court
19 the sought discovery of the complete transcription of the Oklahoma
20 trial proceeding so as to provide to reviewing court the materials
21 (testimonies, ect) to make a fair determination of the State Courts
22 ruling under Strickland v. Washington, 446 U.S. 668 with regards
23 to IAC---specifically prejudice. For said reasons petitioner re-
24 spectfully request this motion be granted and counsel be appointed
25 to assist with facilitation of said discovery.

26
27 Dated: 8-26-08

Dean Kilgore
(Petitioner)